No. 18838

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LIMONEIRA COMPANY, a California corporation, ROGER DONLON, PAUL B. KERSTEN and E. B. ANTONELL, *et al.*,

Appellants,

vs.

W. WILLARD WIRTZ and ROBERT C. GOODWIN,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Southern Division.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment entered June 10, 1963, by the United States District Court for the Southern District of California Southern Division, granting summary judgment to the defendants. The action was brought by the plaintiffs for themselves and on behalf of all users of Mexican National agricultural workers procured under the provisions of Public Law 78, as amended (65 Stat. 119; 7 U. S. C. A. 1461 *et seq.*) to enjoin the defendants from enforcing two so-called "adverse effect wage orders" made by the defendants under the provisions of Section 503, subsection (2) of said Act, and to obtain relief declaring that the said adverse effect wage orders were null and void and of no effect.

The jurisdiction of the District Court was based upon the provisions of 28 U. S. C. A. 1331 and 1332. Since the action arose under an Act of Congress regulating commerce, the court also had jurisdiction under the provisions of Section 1337. *Johnson v. Kirkland,* 290 F. 2d 440, 445, footnote 10; *Wickard v. Filburn,* 317 U. S. 111, 87 L. Ed. 122.

A timely Notice of Appeal from the order of the lower court, granting summary judgment to the defendants, was filed on July 10, 1963, by the plaintiffs. [R. 190.] Accordingly, the jurisdiction of this court is based on the provisions of 28 U. S. C. A. 1291.

STATEMENT OF THE CASE.

This is an action brought by the plaintiffs in the court below as employers of Mexican National agricultural workers procured under the provisions of Public Law 78 (65 Stat. 119; 7 U. S. C. A. 1461 *et seq.,* hereinafter referred to as "Public Law 78" or "the Act"), for themselves and on behalf of all other employers of Mexican National agricultural workers, to challenge the validity of certain "adverse effect wage orders" issued by the Secretary of Labor.

1. The Mexican Farm Labor Program.

The Agricultural Act of 1951, known as Public Law 78, was enacted by Congress to provide for the importation into the United States of Mexican National agricultural workers "for the purpose of assisting in such production of agricultural commodities and products as the Secretary of Agriculture deems necessary, by supplying agricultural workers from the Republic of Mexico . . .". (Sec. 501.)

The Act provided that the importation was to be "pursuant to arrangements between the United States and the Republic of Mexico . . .", and it empowered the Secretary, among other things, "to assist such workers and employers in negotiating contracts for agricultural employment . . .". (Sec. 501.)

Pursuant to the authority granted, the Migrant Labor Agreement of 1951 [R. 71] was negotiated with the Republic of Mexico and has since been amended from time to time by the two countries, and the Standard Work Contract [R. 94], also from time to time amended, was prescribed, setting forth the terms and conditions of employment of the agricultural workers, which were commonly referred to as "braceros". In practice the Migrant Labor Agreement and the Standard Work Contract constitute the administrative regulations under which the program is administered.

In order to protect the wages and working conditions of domestic agricultural workers from harm resulting from the importation of foreign labor, Congress provided in the Act that no workers would be available for employment under the Act unless the Secretary of Labor first determined and certified that (1) sufficient domestic workers able, willing and qualified were not available, (2) the employment of such workers would not adversely affect the wages and working conditions of domestic agricultural workers similarly employed, and (3) reasonable efforts had been made to attract domestic workers for such employment at wages, standard hours of work, and working conditions comparable to those offered to foreign workers. (Public Law 78, Sec. 503; 7 U. S. C. A. 1463.)

Article 9 of the Migrant Labor Agreement provided that "Mexican workers shall not be employed in the United States in any jobs for which domestic workers can be reasonably obtained, or by an employer who is not giving preference in employment to United States domestic workers . . ." It was also required that domestic workers, in addition to being given preference in hiring, had to be paid not less than the wages being offered to Mexican Nationals. Therefore, in order to be eligible to employ Mexican Nationals and to retain this eligibility, an employer had to give such preference in hiring to domestic workers and had to pay them not less than the wages offered to Mexican Nationals.

Prior to the 1961 amendment, Article 15 of the Migrant Labor Agreement provided that "The employer shall pay the Mexican worker not less than the prevailing wage rate paid to domestic workers for similar work at the time the work is performed and in the manner paid within the area of employment, or at the rate specified in the work contract, whichever is higher. The determination of the prevailing wage rate shall be made by the Secretary of Labor."

For the first twelve years of the program the Secretary of Labor administered the Act by conducting a survey to determine the prevailing wage in the area in which braceros were to be employed and by ordering that the braceros could not be employed at a wage less than that determined as the prevailing wage in the particular area.

In 1959, however, the Secretary of Labor in the State of Texas initiated the practice of fixing a minimum piece rate for cotton. This practice was challenged in the case of *Johnson v. Kirkland,* 290 F. 2d

440, 443, on the ground that the Secretary of Labor had no authority to fix wages in agriculture.

In 1961, without any authorization by Congress, Article 15 of the Migrant Labor Agreement and Article 4 of the Standard Work Contract were amended to provide that the employer should pay the Mexican worker the prevailing rate or at the rate "determined by the Secretary of Labor as being necessary to permit him to certify in accordance with the provisions of Article 9(a) of the Agreement, whichever is higher."

It was under and in accordance with this amendment to Article 15 of the Migrant Labor Agreement that the Secretary of Labor proceeded to issue the so-called "adverse effect wage orders".

2. The Facts of This Case.

On March 29, 1962, Arthur J. Goldberg, then Secretary of Labor, issued an order which determined that he could not certify that the employment of Mexican agricultural workers at rates lower than those specified in the order would not adversely affect the wages and working conditions of domestic agricultural workers similarly employed. [R. 11, 12.]

On October 19, 1962, Robert C. Goodwin, acting pursuant to authority delegated to him by the Secretary of Labor, issued an order which determined that he would be unable to certify that the employment of Mexican National agricultural workers at rates lower than those specified in the order would not adversely affect the wages and working conditions of domestic agricultural workers similarly employed. [R. 13, 14, 15.]

On December 20, 1962, the plaintiffs filed their action in the United States District Court for the Southern District of California, Southern Division, asking the court to enjoin the enforcement of said orders and to declare that said orders were null and void because they constituted the fixing of wages in agriculture and were beyond the scope of the authority of the Secretary of Labor under the provisions of Section 503(2) of Public Law 78 (7 U. S. C. A. 1463). [R. 2.] The said action was brought by the plaintiffs for themselves and on behalf of all users of Mexican National agricultural workers procured under the provisions of Public Law 78, and it alleged that the questions to be litigated involved common questions of law and fact affecting the rights of all such users in exactly the same manner as the plaintiffs were affected, and a common relief was sought. [R. 3.]

In their Second Cause of Action the plaintiffs alleged that if the provisions of Public Law 78, Section 503(2) (7 U. S. C. A. 1463) did in fact give the Secretary of Labor the authority to issue the so-called adverse effect wage orders, then said Section 503 (7 U. S. C. A. 1463) was invalid because it constituted a delegation of legislative authority to an administrative official and was consequently unconstitutional and void. [R. 8.]

On April 29, 1963, the defendants filed their Motion for Summary Judgment, which motion came on for hearing on May 20, 1963. In the defendants' Points and Authorities [R. 64] and in the court's opinion it was admitted that the defendants' action constituted the fixing of a minimum wage. [R. 186.] On June 10, 1963, the District Court gave judgment to the defend-

ants on their Motion for Summary Judgment, holding: "Inasmuch as it is found that there are no grounds for distinction, [Between findings of adverse effect based on prevailing wages rather than minimum wages] there can likewise be no claim of unconstitutionality." [R. 180.] The court held further: "The 'adverse affect' is what the statute is designed to prevent, and the fixing of a minimum wage rate would appear to be a much more effective means of preventing an 'adverse affect' than using the prevailing wage rate as a criteria." [R. 186.]

From this judgment this appeal is taken. [R. 190.]

Statutes, Migrant Labor Agreement and Standard Work Contract.

Public Law 78—82d Congress, as Amended
(7 U. S. C. A. 1461 *et seq.*)

AN ACT

To amend the Agricultural Act of 1949.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Agricultural Act of 1949 is amended by adding at the end thereof a new title to read as follows:

"TITLE V—AGRICULTURAL WORKERS

"Sec. 501. For the purpose of assisting in such production of agricultural commodities and products as the Secretary of Agriculture deems necessary, by supplying agricultural workers from the Republic of Mexico (pursuant to arrangements between the United States and the Republic of Mexico, or after every practicable effort has been made by the United States to negotiate and

reach agreement on such arrangements), the Secretary of Labor is authorized—

"(1) to recruit such workers (including any such workers who have resided in the United States for the preceding five years, or who are temporarily in the United States under legal entry);

"(2) to establish and operate reception centers at or near the places of actual entry of such workers into the continental United States for the purpose of receiving and housing such workers while arrangements are being made for their employment in, or departure from the continental United States;

"(3) to provide transportation for such workers from recruitment centers outside the continental United States to such reception centers and transportation from such reception centers to such recruitment centers after termination of employment;

"(4) to provide such workers with such subsistence, emergency medical care, and burial expenses (not exceeding $150 burial expenses in any one case) as may be or become necessary during transportation authorized by paragraph (3) and while such workers are at reception centers;

"(5) to assist such workers and employers in negotiating contracts for agricultural employment (such workers being free to accept or decline agricultural employment with any eligible employer and to choose the type of agricultural employment they desire, and eligible employers being free to offer agricultural employment to any workers of their choice not under contract to other employers);

"(6) to guarantee the performance by employers of provisions of such contracts relating to the payment of wages or the furnishing of transportation.

"Sec. 502. No workers shall be made available under this title to any employer unless such employer enters into an agreement with the United States—

"(1) to indemnify the United States against loss by reason of its guaranty of such employer's contracts;

"(2) to reimburse the United States for essential expenses incurred by it under this title, except salaries and expenses of personnel engaged in compliance activities, in amounts not to exceed $15 per worker; and

"(3) to pay the United States, in any case in which a worker is not returned to the reception center in accordance with the contract entered into under section 501(5), an amount determined by the Secretary of Labor to be equivalent to the normal cost to the employer of returning other workers from the place of employment to such reception center, less any portion thereof required to be paid by other employers.

"Provided, however, That if the employer can establish to the satisfaction of the Secretary of Labor that the employer has provided or paid to the worker the cost of return transportation and subsistence from the place of employment to the appropriate reception center, the Secretary under such regulations as he may prescribe may relieve the employer of his obligation to the United States under this subsection.

"Sec. 503. No workers recruited under this title shall be available for employment in any area unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers who are able, willing, and qualified are not available at the time and place needed to perform the work for which such workers are to be employed, (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed, and (3) reasonable efforts have been made to attract domestic workers for such employment at wages, standard hours of work, and working conditions comparable to those offered to foreign workers.

"In carrying out the provisions of (1) and (2) of this section, provision shall be made for consultation with agricultural employers and workers for the purpose of obtaining facts relevant to the supply of domestic farm workers and the wages paid such workers engaged in similar employment. Information with respect to certifications under (1) and (2) shall be posted in the appropriate local public employment offices and such other public places as the Secretary may require.

"Sec. 504. No workers recruited under this title shall be made available to any employer or permitted to remain in the employ of any employer—

> "(1) for employment in other than temporary or seasonal occupations, except in specific cases when found by the Secretary of Labor necessary to avoid undue hardship; or
>
> "(2) for employment to operate or maintain power-driven self-propelled harvesting, planting, or cultivating machinery, except in specific cases when found by the Secretary of Labor necessary for a temporary period to avoid undue hardship.

"Sec. 505. Workers recruited under this title who are not citizens of the United States shall be admitted to the United States subject to the immigration laws (or if already in, for not less than the preceding five years or by virtue of legal entry, and otherwise eligible for admission to, the United States may, pursuant to arrangements between the United States and the Republic of Mexico, be permitted to remain therein) for such time and under such conditions as may be specified by the Attorney General but, notwithstanding any other provision of law or regulation, no penalty bond shall be required which imposes liability upon any person for the failure of any such worker to depart from the United States upon termination of employment: *Provided,* That no workers shall be made available under this title to, nor shall any workers made available under this title be permitted to remain in the employ of, any employer who has in his employ any Mexican alien when such employer knows or has reasonable grounds to believe or suspect or by reasonable inquiry could have ascertained that such Mexican alien is not lawfully within the United States.

"Sec. 506. (a) Section 210(a)(1) of the Social Security Act, as amended, is amended by adding at the end thereof a new subparagraph as follows:

> "'(C) Service performed by foreign agricultural workers under contracts entered into in accordance with title V of the Agricultural Act of 1949, as amended.'

"(b) Section 1426(b)(1) of the Internal Revenue Code, as amended, is amended by adding at the end thereof a new subparagraph as follows:

"'(C) Service performed by foreign agricultural workers under contracts entered into in accordance with title V of the Agricultural Act of 1949, as amended.'

"(c) Workers recruited under the provisions of this title shall not be subject to the head tax levied under Section 2 of the Immigration Act of 1917 (8 U. S. C. sec. 132).

"(d) Workers recruited under the provisions of this title shall not be subject to any Federal or State tax levied to provide illness or disability benefits for them.

"Sec. 507. For the purposes of this title, the Secretary of Labor is authorized—

"(1) to enter into agreements with Federal and State agencies; to utilize (pursuant to such agreements) the facilities and services of such agencies; and to allocate or transfer funds or otherwise to pay or reimburse such agencies for expenses in connection therewith;

"(2) to accept and utilize voluntary and uncompensated services; and

"(3) when necessary to supplement the domestic agricultural labor force, to cooperate with the Secretary of State in negotiating and carrying out agreements or arrangements relating to the employment in the United States, subject to the immigration laws, of agricultural workers from the Republic of Mexico.

"Sec. 508. For the purpose of this title—

"(1) The term 'agricultural employment' includes services or activities included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938, as amended, or section 1426(h) of the Internal Revenue Code, as amended.

"(2) The term 'employer' shall include an association, or other group of employers, but only if (a) those of its members for whom workers are being obtained are bound, in the event of its default, to carry out the obligations undertaken by it pursuant to section 502, or (b) the Secretary determines that such individual liability is not necessary to assure performance of such obligations.

"Sec. 509. Nothing in this Act shall be construed as limiting the authority of the Attorney General, pursuant to the general immigration laws, to permit the importation of aliens of any nationality for agricultural employment as defined in section 508, or to permit any such alien who entered the United States legally to remain for the purpose of engaging in such agricultural employment under such conditions and for such time as he, the Attorney General, shall specify.

"Sec. 510. No workers will be made available under this title for employment after December 31, 1963."

Article 15
WAGES

The employer shall pay the Mexican worker not less than the prevailing wage rate paid to domestic workers for similar work at the time the work is performed and in the manner paid within the area of employment, or at the rate specified in the work contract, whichever is higher. The determination of the prevailing wage rate shall be made by the Secretary of Labor.

No authorization will be issued by the Secretary of Labor under Article 10 of this Agreement on the basis of a job order specifiying a wage rate which he finds has been adversely affected by the employment of illegal workers in the area.

In no case shall the Secretary of Labor make an authorization on the basis of any job order which specifies a wage rate found by the Secretary of Labor to be insufficient to cover the Mexican worker's normal living needs. In cases where the condition of a crop makes it impossible for a Mexican worker working with normal diligence and application to earn enough at the prevailing wage rate to cover his normal living needs, even though working full time, the Secretary of Labor shall conduct an investigation, and where requested by the Mexican Consul a joint investigation shall be conducted in accordance with Article 30 of this Agreement, to determine the proper steps necessary to remedy the situation. If no satisfactory adjustment in the wage rate can be agreed upon with the employer, the Secretary of Labor shall, if possible, arrange for a transfer of the workers to other agricultural employment. If

no such transfer can be effected within 5 days the Secretary of Labor shall terminate the work contract, and the employer shall, at his expense, return the worker to the reception center. Nothing in this paragraph is intended to affect the provisions of Article 25 of this Agreement.

The Mexican Consuls and the representatives of the Secretary of Labor shall exercise vigilance to insure that the wage rate paid to the Mexican worker is not less than the prevailing wage rate for similar work in the area of employment and that wages are paid to the Mexican workers in accordance with such rate or with any increase in such rate which may become effective in the area during the period of employment, but not below the minimum rate specified in the work contract. Increases in prevailing wage rates shall be put into effect immediately by the employer and shall not be contingent upon a formal request to do so by the Mexican worker, the Consul of Mexico, or the representative of the Secretary of Labor. Declines in prevailing wage rates shall be recognized and accepted by the Mexican worker, provided they do not fall below the rates specified in the work contract.

The Secretary of Labor shall periodically furnish the appropriate Mexican Consuls and Consuls General information with respect to the prevailing wage rates in their respective jurisdictions. The Secretary of Labor shall also furnish to the representative of the Mexican Government in Washington like information with respect to all areas in which Mexican workers are employed.

Any complaints concerning the failure to pay the prevailing wage rate shall be resolved by application of the procedure described in Article 30 of this Agreement.

The pay period for the Mexican worker shall be established at intervals no less frequent than those established for the employers' domestic workers; provided that, in no event shall the worker be paid less frequently than bi-weekly; provided further, that the employer may defer the payment of not to exceed a total of 4 days' earnings of such Mexican worker from one pay period to the next until the final payment of wages is made to him, at which time payment shall be made of all sums due to the Mexican worker.

Joint Interpretations and Amendments of March 1954

The wage rates paid to the Mexican worker may not be less than the prevailing wages for domestic laborers performing the same activity in the same area of employment as determined by the Secretary of Labor. The Secretary of Labor will give special attention, in conformity with Article 15 of the Agreement, to the fact that there shall not be issued authorizations which specify a wage rate which, in his opinion, has been adversly influenced by the presence of illegal workers in the area of employment. The prevailing wage rates shall be communicated to the Secretary of Foreign Relations as the Secretary of Labor determines them but not less than once a month.

In each of the migratory stations of Mexico and in each of the reception centers of the United States there shall be fixed, in prominent places, bulletins in which are specified the prevailing wage rates for each type of employment in each area of employment in which Mexican workers from the respective migratory stations and

reception centers will be employed in order that these wage rates may be known in advance by the Mexican workers who, in any event, may discuss them with the employers and accept or reject them.

If the Secretary of Foreign Relations believes that the determination of the Secretary of Labor, with respect to a specific wage rate for a specific area, is incorrect, he will inform the Secretary of Labor of his views in the matter, furnishing the Secretary of Labor the information upon which he bases his conclusion so that, in case the Secretary of Labor concurs in this conclusion, he may use the powers granted him by Article 15 of the Agreement to withhold authorizations which include such wage rates.

In case the Secretary of Labor, after reviewing the information furnished him by the Secretary of Foreign Relations, does not find that prior determination is inaccurate a joint investigation will be undertaken by the appropriate representatives of the two Governments, if requested by the Secretary of Foreign Relations, in order that the Secretary of Labor may determine whether it is appropriate to make a new determination of the prevailing wage rate. The contracting of workers will not be interrupted meanwhile but the Government of Mexico may inform the workers at the migratory stations that a joint investigation will be made with respect to the wage rates in question. If, as a result of the joint investigation the investigators cannot reach an agreement as to the information to be submitted to the Secretary of Labor, the Government of Mexico may request the Secretary of Labor to consider any information it desires to present concerning the prevailing wages.

Standard Work Contract, as Amended.

Article 4

PAYMENT OF WAGES

The employer shall pay the Mexican worker not less than the prevailing wage rate paid to domestic workers for similar work at the time the work is performed and in the manner paid within the area of employment, or at the rate specified in the work contract, whichever is higher. The determination of the prevailing wage rate shall be made by the Secretary of Labor.

Migrant Labor Agreement of 1951, as Amended in 1961.

Article 15

WAGES

(a) The employer shall pay the Mexican worker not less than the prevailing wage rate paid to domestic workers for similar work at the time the work is performed and in the manner paid within the area of employment, or at the rate specified in the individual work contract which shall be the rate determined by the Secretary of Labor as being necessary to permit him to certify in accordance with the provisions of Article 9(a) of the Agreement, whichever is higher. The determination of the prevailing wage rate will also be made by the Secretary of Labor. The employer and the Mexican worker shall be bound by the Secretary of Labor's determination of the wage rate required to be paid under this Article, and such determination shall be final and conclusive.

(b) In no case shall the Secretary of Labor issue an authorization to an employer on the basis of any job order which specifies a wage rate found by the

Secretary of Labor to be insufficient to cover the Mexican workers' normal living needs. In cases where the condition of a crop makes it impossible for a Mexican worker working with normal diligence and application to earn enough to cover his normal living needs at the rate being paid by the employer, even though working full time, the Secretary of Labor shall conduct an investigation, and where requested by the Mexican Consul, a joint investigation shall be conducted, to determine a course of action necessary to remedy the situation. If no satisfactory adjustment in the wage rate can be agreed upon with the employer, the Secretary of Labor shall proceed in accordance with the applicable provisions of Article 7 of this Agreement. Nothing in this paragraph is intended to affect the provisions of Article 25 of this Agreement.

(c) The Mexican Consuls and the representatives of the Secretary of Labor shall exercise vigilance to insure that the wage rate paid to the Mexican worker is not less than the wage rate required to be paid under (a) of this Article for similar work in the area of employment and that wages are paid to the Mexican workers in accordance with such rate or with any increase in such rate which may become effective in the area during the period of employment, but not below the minimum rate specified in the work contract. Increases in prevailing wage rates shall be put into effect immediately by the employer and shall not be contingent upon a formal request to do so by the Mexican worker, the Consul of Mexico, or the representative of the Secretary of Labor. Declines in prevailing wage rates shall be recognized and accepted by the Mexican worker, provided they do not fall below the rates specified in the work contract.

(d) The Secretary of Labor shall periodically furnish the appropriate Mexican Consuls and Consuls General information with respect to the prevailing wage rates in their respective jurisdictions. The Secretary of Labor shall also furnish to the representative of the Mexican Government in Washington, D.C., like information with respect to all areas in which Mexican workers are employed.

(e) Any complaints concerning the failure to pay the wage rate required to be paid under this Article shall be resolved by application of the procedures described in Article 30 of this Agreement.

(f) The pay period for the Mexican worker shall be established at intervals no less frequent than those established for the employer's domestic workers; provided that, in no event shall the worker be paid less frequently than bi-weekly; provided further, that the employer may defer the payment of not to exceed a total of 4 days' earnings of such Mexican worker from one pay period to the next until the final payment of wages is made to him, at which time payment shall be made of all sums due to the Mexican worker.

Explanatory note: The amendment contained in paragraph (a) of Article 15 is to confirm the Secretary of Labor's authority to require payment of a wage rate determined by him to be necessary to avoid adverse effect even though such wage rate were higher than the prevailing.

The finality provision set forth in the last sentence of section (a) works no substantive change in the Agreement but merely makes more explicit the already existing requirement of the Migrant Labor Agreement

that as a condition of participating in the program employers of Mexican workers agree to be finally bound by the Secretary of Labor's determination of the prevailing wage rate.

Reference to the employer's obligation to provide at his own expense, for the return of the Mexican worker to the reception center upon termination of the work contract has been deleted since this matter is covered by Article 17. No substantive change in this aspect of Article 15 has been effected and the employer's obligation remains unchanged.

Joint Interpretation of 1961

Wage rates paid to the Mexican worker may not be less than the prevailing wages for domestic workers performing the same activity in the same area of employment as determined by the Secretary of Labor or the wage rate determined by the Secretary of Labor as necessary to avoid adverse effect upon the wages and working conditions of domestic agriculture workers similarly employed. The prevailing wage rates and the wages determined by the Secretary of Labor to be necessary to avoid adverse effect shall be communicated to the Secretary of Foreign Relations as the determination of such wages is made but not less frequently than once a month.

In each of the migratory stations of Mexico and in each of the reception centers of the United States there shall be fixed, in prominent places, bulletins in which are specified the prevailing wage rates for each type of employment in each area of employment in which Mexican workers from the respective migratory stations and reception centers will be employed in order that these

wage rates may be known in advance by the Mexican workers who, in any event, may discuss them with the employers and accept or reject them.

If the Secretary of Foreign Relations believes that the determination of the Secretary of Labor with respect to a prevailing wage rate for a specific area is incorrect, he will inform the Secretary of Labor of his views in the matter. He will furnish the Secretary of Labor the information upon which he bases this conclusion in order that the Secretary of Labor may consider such information in reviewing the matter.

In case the Secretary of Labor, after reviewing the information furnished him by the Secretary of Foreign Relations, does not find that prior determination is inaccurate a joint investigation will be undertaken by the appropriate representatives of the two Governments, if requested by the Secretary of Foreign Relations, in order that the Secretary of Labor may determine whether it is appropriate to make a new determination of the prevailing wage rate. The contracting of workers will not be interrupted meanwhile but the Government of Mexico may inform the workers at the migratory stations that a joint investigation will be made with respect to the wage rates in question. If, as a result of the joint investigation the investigators cannot reach an agreement as to the information to be submitted to the Secretary of Labor, the Government of Mexico may request the Secretary of Labor to consider any information it desires to present concerning the prevailing wages.

Standard Work Contract, as Amended in 1961.

Article 4

PAYMENT OF WAGES

(a) The employer shall pay the Mexican worker not less than the prevailing wage rate paid to domestic workers for similar work at the time the work is performed and in the manner paid within the area of employment, or at the rate specified in the individual work contract which shall be the rate determined by the Secretary of Labor as being necessary to permit him to certify in accordance with the provisions of Article 9(a) of the Agreement, whichever is higher. The determination of the prevailing wage rate will also be made by the Secretary of Labor. The employer and the Mexican worker agree to be bound by the Secretary of Labor's determination of the wage rate, required to be paid under this Article, and such determination shall be final and conclusive.

SPECIFICATION OF ERRORS RELIED ON.

1. The District Court erred [R. 179] in concluding that the Secretary of Labor did not exceed his statutory authority in fixing a minimum wage to be paid Mexican National agricultural workers by Letter No. 1281 and by "Lettuce Harvest Determination", Exhibits A and B to Complaint. [R. 11, 12, 13, 14, 15.]

2. The District Court erred in concluding that there is no substance to the claim that Section 503 of the Act is unconstitutional. [R. 179.]

3. The District Court erred in concluding that there are no grounds for distinction between the Secretary of Labor's determination of adverse effect based on pre-

vailing wage and his determination based on a minimum wage. [R. 179.]

4. The District Court erred in failing to grant the injunctive and the declaratory relief prayed for by the appellants as against the aforementioned adverse effect wage orders. [R. 179, 188.]

5. The District Court erred in granting summary judgment to the appellees. [R. 179, 188.]

QUESTIONS PRESENTED.

1. Whether Section 503(2) of the Act (7 U. S. C. A. 1463) gives the Secretary of Labor the authority to fix minimum wages in agriculture as was done by the Secretary in the two so-called adverse effect wage orders.

2. In the alternative, and assuming that Section 503(2) (7 U. S. C. A. 1463) does give the Secretary of Labor the authority to fix a wage in agriculture, whether said Section 503(2) is invalid because it grants legislative authority to an administrative official.

SUMMARY OF ARGUMENT.

The two adverse effect wage orders purportedly issued under the authority of Section 503(2) of Public Law 78, 7 U. S. C. A. 1463 (hereinafter referred to as "the Act") by the Secretary of Labor are illegal because they constitute the fixing of a wage in agriculture, and consequently are in excess of the authority given the Secretary of Labor by the statute.

The authority of an administrative officer acting under an Act of Congress must be strictly limited by the terms of the Act. Section 503(2) authorizes the Sec-

retary of Labor only to determine and certify whether the contemplated employment of Mexican Nationals will adversely affect the wages and working conditions of domestic agricultural workers. Adverse effect must be measured against prevailing wage and can only result from the payment of less than the prevailing wage to Mexican Nationals. This interpretation of the statute urged by the appellants is supported by the following:

1. The language, which is clear and unambiguous, the common ordinary meaning of which is that the Secretary of Labor shall certify and determine whether adverse effect will occur. The plain and simple language does not mean that the Secretary of Labor shall fix a wage which will enable him to determine and certify that no adverse effect results.

2. Section 501(5) of the Act, which makes it clear that the wage to be paid Mexican Nationals is to be a negotiated wage and not a wage fixed by the Secretary of Labor.

3. The 1955 amendments to Section 503(2) which make it clear that Congress intended only that the Secretary of Labor make a survey to determine the prevailing wage and base his adverse effect wage determination thereon.

4. The Fair Labor Standards Act, which exempts agriculture from the provisions of the minimum wage laws; therefore Section 503(2) must be interpreted as being in harmony with this expressed intention of Congress to exempt agriculture. The interpretation insisted upon by the Secretary of Labor would constitute a repeal by implication of the agricultural exemption of the Fair Labor Standards Act.

5. The administrative interpretation of Section 503(2) as written into the Migrant Labor Agreement and the Standard Work Contract prior to the 1961 amendment, followed by the Department of Labor for the first twelve years of the Migrant Labor Program.

6. The entire legislative history of Public Law 78, Public Law 78 in general, and Section 503(2) in particular, which show clearly the intention of Congress that the authority of the Secretary of Labor was to be limited to the determination of adverse effect by reference to prevailing wage; it shows that Congress did not intend to authorize the Secretary of Labor to fix a wage in agriculture, and the legislative reports repeatedly warn the Secretary of Labor against this attempted encroachment on the prerogatives of Congress.

7. Finally, the fixing of a minimum wage is a legislative act. If Congress did in fact intend to give the Secretary of Labor the power to fix wages in agriculture, or in any other part of the economy, Congress thereby made a delegation of legislative power to an administrative official. Such a delegation of legislative power is illegal and unconstitutional because it was not accompanied by proper standards and limits. Congress must be presumed, however, not to have intended to make an invalid delegation of legislative authority, and where another interpretation is open to the court, the court is compelled to adopt such other interpretation. The interpretation offered by the appellants avoids invalidating the Act in question.

ARGUMENT.

I.

THE POWER EXERCISED BY AN ADMINISTRATIVE OFFICIAL UNDER AN ACT OF CONGRESS IS STRICTLY CIRCUMSCRIBED BY THE TERMS OF THE ACT.

A power conferred on an administrative official by the legislature is necessarily circumscribed and limited by the statute conferring or delegating that power. It is only the power to carry into effect the will of the legislature, expressed by the legislation. Under the guise of exercising the power conferred or delegated, an administrative official may not make rules or regulations, or negotiate executive agreements with a foreign power, which are inconsistent with or out of harmony with or which alter, add to, extend, enlarge, subvert, or impair the Act being administered. Hence, acting under the authority of Public Law 78, the Secretary of Labor may not negotiate an executive agreement with the Republic of Mexico which enlarges his powers or goes beyond the scope of the authority given to him by the Act.

It is the province and the duty of the courts to scrutinize the acts of administrative officials to determine whether they exceed the legislative grant of authority and whether they infringe upon the rights of individuals who are affected by the administrative authority exercised. Applying this well known and established principle of constitutional and administrative law, the Supreme Court in the case of *Stark v. Wickard,* 321 U. S. 288, 88 L. Ed. 733, held:

> "When Congress passes an Act empowering administrative agencies to carry on governmental ac-

> tivities, the power of those agencies is circumscribed by the authority granted. . . . The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. . . ."

In the case of *Waite v. Macy,* 246 U. S. 606, 62 L. Ed. 892, an administrative board was given the power to establish standards of "purity, quality and fitness of all kinds of imported tea", and acting under this power the board excluded tea imported by the plaintiffs because of the presence of substances which the court found were not in any way deleterious. In holding that the board exceeded its powers Justice Holmes stated:

> "The Secretary and the board must keep within the statute . . . which goes to their jurisdiction."
>
> * * * * *
>
> "No doubt it is true that this court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness."

Paraphrasing Justice Holmes, it is submitted that the Secretary of Labor cannot enlarge the powers given him by Congress and establish minimum wages, and cover the usurpation by calling it "a wage necessary to prevent adverse effect".

A. An Administrative Official May Not Enlarge His Powers Through the Expediency of Issuing Administrative Regulations.

The corollary of the above stated principle that an administrative official must act within the scope of the authority granted by Congress is that such an administrative official may not enlarge his powers by the simple expedient of writing and issuing administrative regulations. In administering Public Law 78 the Secretary may not amend the Migrant Labor Agreement, which is the administrative regulation under which the Migrant Labor Program is administered, to give himself authority not granted in the law itself. As stated by the court in *Panama Refining Co. v. Ryan,* 293 U. S. 388, 428, 79 L. Ed. 447:

> ". . . From the beginning of the government the Congress has conferred upon executive officers the power to make regulations, . . . 'not for the government of their departments, but for administrating of the laws which did govern.' *U.S. v. Grimaud,* 220 U.S. 506, 55 L.Ed. 563, 31 Sup. Ct. 480. Such regulations become, indeed, binding rules of conduct, but they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined."

II.

THE AUTHORITY OF THE SECRETARY OF LABOR MUST BE DETERMINED BY A CONSTRUCTION OF THE PERTINENT PROVISIONS OF THE STATUTE IN QUESTION, APPLYING THE RULES OF CONSTRUCTION.

It is the duty of the courts to construe statutes for the purpose of determining whether a particular act done or omitted falls within the intended inhibition or commandment of such statute. The primary rule in construing statutes is to determine the will of the legislature. The legislative intent is the heart, the soul, and the essence of the law, and its ascertainment is the objective of judicial construction. *United States v. Stone,* 274 U. S. 225, 71 L. Ed. 1013; *Ebert v. Poston,* 266 U. S. 548, 69 L. Ed. 435.

The application of the rules of construction is the method by which courts determine the legislative intent. *Hassett v. Welch,* 303 U. S. 303, 82 L. Ed. 858.

A. There Is No Ambiguity in the Language.

A cardinal principle of construction is that a statute is open to interpretation or construction only where there is an ambiguity or where it will bear two or more possible interpretations. It may be construed only where the language of the statute requires such construction, as where it is of doubtful or obscure meaning such that reasonable minds might be uncertain or in disagreement as to the meaning. Where the language is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to the rules of statutory interpretation, and the court has no authority to look for or impose a different meaning.

Boggs v. Fleming, 66 F. 2d 855; *United States v. Missouri,* 278 U. S. 269, 73 L. Ed. 322.

An ambiguity is defined as a doubtfulness or doubleness of meaning, an indistinctness or an uncertainty of expression. *Black's Law Dictionary,* 2d Edition. The courts may not find ambiguity in statutory language which laymen are able to comprehend. *Portland v. Hoss,* 81 A. L. R. 1136. The rules of interpretation are resorted to only for the purpose of resolving an ambiguity, not for the purpose of creating it. In the absence of an ambiguity courts should adhere to the commonly accepted meaning of language and should not import other than such commonly understood meaning to the terms employed in the enactment of a statute. *Railroad Commission v. Quincy Railroad,* 257 U. S. 563, 66 L. Ed. 371; *United States v. Shreveport,* 287 U. S. 77, 77 L. Ed. 175.

The critical language in issue is contained in Section 503:

> ". . . determined and certified that . . . (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed."

The key words of this section and those conveying the Congressional intent are the following: "determined", "certified", "adversely affect", "wages" and "similarly employed".

Webster's Dictionary defines "determine" as follows: "to decide . . . To come to a decision concerning, as the result of an investigation, reasoning, etc.; to settle . . . to resolve."

"Certify" is defined as follows: "To attest authoritatively; to verify . . ."

"Adverse" is defined as follows: "Acting against, or in a contrary direction; antagonistic; . . . In hostile opposition to one's interests; calamitous; afflictive; . . ."

The word "wages" needs no definition. The wages referred to are those paid to domestic agricultural workers during the period of the employment of the Mexican Nationals concerning whom the certification is made.

The words "similarly employed" require no definition. They simply mean "doing the same kind of work."

Giving to the language of Section 503(2) the ordinarily accepted meaning of the words used, it is submitted that the section means that no workers shall be available unless the Secretary of Labor makes a finding or a decision, and attests authoritatively as to that decision, that the employment of the Mexican Nationals in question will not have a harmful result on the wages and working conditions paid to domestic workers doing the same kind of work during the time the Mexican Nationals are employed.

The wage paid to domestic workers doing the same kind of work as the Mexican Nationals is the prevailing wage for that particular type of employment. If the prevailing wage is paid to the Mexican Nationals, then the employment of such Mexican Nationals cannot depress the prevailing wage and no harmful result can possibly occur. Hence adverse effect is measured against prevailing wage and can only occur when less than the prevailing wage is paid to the Mexican Nationals.

To say that the language of Section 503(2) means that the Secretary of Labor shall arbitrarily fix a wage having no relationship to the prevailing wage which will enable him to "determine and certify that the employment of Mexican workers would not adversely affect the wages and working conditions and employment opportunities of domestic agricultural workers" is to read something into the statute which is not there. It is a strained and tortured interpretation of otherwise plain, simple and ordinary language.

Reduced to the simplest terms, the issue is this: Does Section 503(2) provide that the Secretary of Labor shall determine whether adverse effect will result, or does it provide that the Secretary shall fix and enforce a wage which will enable him to determine that adverse effect will not result. It is submitted that the former interpretation is the only interpretation which can reasonably be given to the language in question. Had Congress intended that the power of the Secretary was to raise the domestic wage rate, establish a minimum wage, or to improve working conditions of domestic agricultural workers in the future, Congress would have used clear and specific language to confer this power. This is only too evident when the language of Section 503 is compared with the language of the *Minimum Wage Law,* 29 U. S. C. A. Sections 206 and 213:

"§206. Minimum wages; effective date

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates —. . ."

"§213. Exemptions

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to . . . (6) any employee employed in agriculture. . . ."

B. Construction by Reference to Other Parts of the Statute Supports Appellants' Construction Regarding Limits of the Secretary of Labor's Authority.

In 1955 Congress amended Section 503 by adding a second paragraph which provides:

> "In carrying out the provisions of (1) and (2) of this section, provision shall be made for consultation with agricultural employers and workers for the purpose of obtaining facts relevant to the supply of domestic farm workers and the wages paid such workers engaged in similar employment. Information with respect to certifications under (1) and (2) shall be posted in the appropriate local public employment offices and such other public places as the Secretary may require."

From this it is evident that Congress intended to establish the administrative procedure to be followed and the facts to be found by the Secretary of Labor in his consultation with employers and employees. These are the facts relating to the present supply of domestic farm workers and the wages presently paid such workers engaged in similar employment. If these are the facts upon which the Secretary was to base his adverse effect determination, then it is clear and obvious that Congress intended that adverse effect was to be measured against prevailing wage and the Secretary of Labor's adverse effect determination was to be based thereon. This intention on the part of Congress is clearly expressed by the statement in *Senate*

Report 1045 dated July 20, 1955, U. S. Code, Congressional and Administrative News, Vol. 2, 84th Congress; 1st Session 1955, page 2848, and which, in addition to proposing the amendment to Section 503, provided for a two year extension to Public Law 78:

> "It is believed that this amendment specifying the information to be obtained and the persons from whom it is to be obtained will clarify procedures presently used and improve operations of the Act."

That adverse effect was to be measured as against the prevailing wage was also the conclusion of the court in *Johnson v. Kirkland,* 290 F. 2d 440, 445, which observed:

> "This argument gains some support from the 1955 amendments to Section 1463. . . . The Act as to elements (1) and (2) requires that the Secretary make an actual field survey and then post his findings. Inquiry on wages would have to relate to the currently prevailing domestic wage rate."

The same conclusion was reached by the court in *Dona Ana County Farm & Livestock Bureau v. Goldberg,* 200 F. Supp. 210 (1961):

> "As both parties appear to agree, the Secretary of Labor is not authorized directly to fix wages under the Agricultural Act, but is only empowered to determine the actual prevailing wages paid to domestic workers in the area of employment which must be paid to Mexican National farm workers performing the same activity in the same area of employment."

The language of Section 501, subsection (5) is a further indication of Congressional intent as to the extent of the Secretary of Labor's authority under Section 503 (7 U. S. C. A. 1463):

> ". . . the Secretary of Labor is authorized— . . . (5) to assist such workers and employers in negotiating contracts for agricultural employment (such workers being free to accept or decline agricultural employment with any eligible employer and to choose the type of agricultural employment they desire, and eligible employers being free to offer agricultural employment to any workers of their choice not under contract to other employers);"

This plain, simple and unambiguous language indicates the Congressional intention that the wage paid the Mexican National be a negotiated wage and not a wage fixed or determined by the Secretary of Labor, but subject to the limitation that it be not less than the prevailing wage. This is clearly borne out by the "Joint Interpretation and Amendment of March 1954" to Article 15, Wages, of the Migrant Labor Agreement, which provides in part as follows:

> "In each of the migratory stations of Mexico and in each of the reception centers of the United States there shall be fixed, in prominent places, bulletins in which are specified the prevailing wage rates for each type of employment in each area of employment in which Mexican workers from the respective migratory stations and reception centers will be employed in order that these wage rates may be known in advance by the Mexican workers who, in any event, may discuss them with the employers and accept or reject them."

This Joint interpretation makes it abundantly clear that both the Government of Mexico and the Secretary of Labor regarded the wage to be paid the Mexican National as one to be arrived at by negotiation and not one fixed by the Secretary of Labor.

In conclusion, therefore, it is submitted that a construction of Section 503(2), along with Section 501(5), leads to the inevitable conclusion that the Congressional intent was that the wage rate paid to Mexican Nationals was to be a negotiated wage and not a wage fixed by the Secretary of Labor. The fact that the Secretary of Labor adhered to this interpretation for the first twelve years of his administration of the program is strong and compelling evidence of the fact that this is the proper interpretation of Congressional intent.

C. Construction by Reference to Other Statutory Enactments Supports Appellants' Contention Regarding the Limits of the Secretary of Labor's Authority.

1. The Purpose of Construction Is to Harmonize the Statute With the Over-All Legislative Scheme.

One of the prime rules of construction is that the court should take into consideration the general policy of the legislature and the overall legislative scheme as it is reflected in other statutes.

In 1938 Congress enacted the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. A. 201 *et seq.* Section 206 of the Act provided a minimum wage. Section 213 of the same Act set forth exemptions to the minimum wage section. Subsection (6) of Section 213 includes within the exemption "any employee employed in agriculture".

It must be presumed to have been the intention of Congress that all of its enactments which are not repealed should be given effect. Accordingly, statutes should be so construed, if possible, so as to give full force an effect to each other statute. The court should not assume that one or the other of related statutes is meaningless and of no operational effect. Consistency and harmony is of prime importance, and where it is possible to do so it is the duty of the court to adopt that construction of a statute which harmonizes and reconciles it with other statutory enactments.

Zip Mfg. Co. v. Pep Mfg. Co., 44 F. 2d 184;
Heiden v. Cremin, 66 F. 2d 943;
Burton v. Denver, 107 A. L. R. 564;
Smith v. Board of Trustees, 198 Cal. 301;
Ariz. Eastern R.R. Co. v. Matthews, 7 A. L. R. 1149.

If Section 503 were construed as giving to the Secretary of Labor the authority to prescribe a minimum wage in agriculture, then such interpretation would place Section 503 in conflict with the Fair Labor Standards Act agricultural exemption. It would nullify the said agricultural exemption. On the other hand, if Section 503 is interpreted as giving the Secretary of Labor only the authority to measure adverse effect as against the prevailing wage, then such interpretation would be completely consistent with and in harmony with the agricultural exemption of the Fair Labor Standards Act. For this reason it is submitted that the latter interpretation should be adopted.

2. Repeals by Inference or Implication Are Not Favored by the Courts.

As a general rule, the legislature when it intends to repeal a statute may be expected to do so in express terms by the use of words which are the equivalent of an express repeal. In any case, an intent to repeal by implication must appear clearly and unequivocally.

The courts will not presume that the legislature intended to repeal by inference. Indeed, the presumption is always against the intention to repeal except where express terms are used or where effect cannot be reasonably given to both statutes.

Therefore, Section 503 may not be interpreted as giving the Secretary of Labor the authority to fix a wage in agriculture where the effect would be to repeal that portion of the Fair Labor Standards Act which exempted agriculture from the minimum wage laws. It cannot be reasonably expected that Congress would have intended to give the Secretary of Labor the authority to act in a field where Congress in its wisdom saw fit not to act itself.

Posadas v. National City Bank, 296 U. S. 497, 80 L. Ed. 351;

West India Oil Co. v. Domenech, 311 U. S. 20, 85 L. Ed. 16;

Zip Mfg. Co. v. Pep Mfg. Co., 44 F. 2d 184;

Corn Exch. Savings Bank v. Smith, 78 A. L. R. 800;

United States v. Borden Co., 308 U. S. 188, 84 L. Ed. 181.

D. Construction by Reference to Long Established Administrative Practice Supports Appellants' Contention Regarding the Limits of the Secretary of Labor's Authority.

Another important guide to the construction of the Act in question is the interpretation placed thereon by the Secretary of Labor during the first twelve years of his administration of the migrant labor program under Public Law 78. The construction of the Secretary of Labor was written into the Migrant Labor Agreement and the Joint Interpretation thereto, and the Standard Work Contract, which constitute the administrative regulations of the Act, all of which the Secretary played an important part in drafting. Prior to 1962 Article 15 of the Migrant Labor Agreement provided:

> "The employer shall pay the Mexican worker not less than the prevailing wage rate paid to domestic workers for similar work at the time the work is performed and in the manner paid within the area of employment, or at the rate specified in the work contract, whichever is higher. The determination of the prevailing wage rate shall be made by the Secretary of Labor."

Article 4 of the Standard Work Contract contained the same provision in identical language.

The "Joint Interpretation and Amendment of March 1954" provides in part as follows:

> "The wage rates paid to the Mexican worker may not be less than the prevailing wages for domestic laborers performing the same activity in the same area of employment as determined by the Secretary of Labor. The Secretary of Labor will

give special attention, in conformity with Article 15 of the Agreement, to the fact that there shall not be issued authorizations which specify a wage rate which, in his opinion, has been adversely influenced by the presence of illegal workers in the area of employment. The prevailing wage rates shall be communicated to the Secretary of Foreign Relations as the Secretary of Labor determines them but not less than once a month.

"In each of the migratory stations of Mexico and in each of the reception centers of the United States there shall be fixed, in prominent places, bulletins in which are specified the prevailing wage rates for each type of employment in each area of employment in which Mexican workers from the respective migratory stations and reception centers will be employed in order that these wage rates may be known in advance by the Mexican workers who, in any event, may discuss them with the employers and accept or reject them."

During the first twelve years of the program the Secretary of Labor administered the program according to these provisions which he himself helped to draft.

The practice of the Secretary of Labor during this period of time was to conduct a survey in a particular area in order to determine the prevailing wage, and following this survey issued orders to the effect that he could not determine and certify that adverse effect would not result unless Mexican Nationals were paid a wage not less than the prevailing wage so determined in the particular area. In short, adverse effect was measured as against the prevailing wage in a given area, and no adverse effect was deemed to exist unless

and until the employers of braceros paid less than that prevailing wage.

However, in 1961 both Article 15 of the Migrant Labor Agreement and Article 4 of the Standard Work Contract were amended to provide that the employer shall pay the Mexican worker not less than the prevailing rate or the rate specified in the work contract which "shall be the rate determined by the Secretary of Labor as being necessary to permit him to certify in accordance with the provisions of Article 9(a) of the agreement, whichever is higher." Congress had not changed Section 503 of the law with respect to the determinations to be made by the Secretary of Labor. But without Congressional authority the Secretary assumed, pursuant to his own change in the administrative regulations, the authority to fix a minimum wage in agriculture, which he euphemistically called "the wage determined by the Secretary of Labor as being necessary to avoid adverse effect."

Construction and interpretation by an administrative agency of the law under which it acts provides a practical guide as to the interpretation of the law and is an experienced and informed judgment to which the courts and the litigants may properly resort for guidance.

White v. Winchester, 315 U. S. 32, 86 L. Ed. 619;

N. Y. v. Frank, 314 U. S. 360, 86 L. Ed. 277, *Annotation,* 84 L. Ed. 28;

Bowen v. Johnson, 306 U. S. 19, 83 L. Ed. 455;

Mintz v. Baldwin, 289 U. S. 346, 77 L. Ed. 1245;

Fawcus v. United States, 282 U. S. 375, 75 L. Ed. 379;

Luckenbach v. United States, 280 U. S. 173, 74 L. Ed. 356.

The long standing practice of the Secretary of Labor in the administration of the statute effectively expressed his understanding of the Congressional intent. When after a long period of such practice a change in the interpretation of the law is made, without Congressional authority, which substantially enlarges the authority of the administrative official, it is submitted that such change should be regarded with great suspicion and it should be incumbent upon the administrative official to explain such change.

1. Re-Enactment of the Law by Congress Constituted the Adoption of the Administrative Regulations in Effect at the Time.

Public Law 78 as enacted in 1951 was for a period of two years, and since that date Congress has repeatedly re-enacted Public Law 78 at the end of each two year period. The administrative construction followed by the Secretary of Labor for the first twelve years of the Migrant Labor Program was repeatedly confirmed and approved by each subsequent re-enactment of the law from 1951 to the present date. Congress was in fact cognizant of the established administrative practice of determining adverse effect on the basis of prevailing wage, as was provided in the Migrant Labor Agreement and the Standard Work Contract prior to the 1961 amendments. Each time it extended the Act without any change in its provisions it impliedly adopted the construction applied by the administrative authority. Therefore, the Congressional

intent that adverse effect was to be measured against prevailing wage is clearly established by such repeated re-enactment of the law.

Hartley v. Commissioner, 295 U. S. 216, 79 L. Ed. 1399;

Cook v. United States, 288 U. S. 102, 77 L. Ed. 641;

Johnson v. Manhattan, 289 U. S. 479, 77 L. Ed. 1331;

Luckenbach v. United States, 280 U. S. 173, 74 L. Ed. 356.

E. Statutes Must Be Construed so as to Give Effect to the Same—Not so as to Nullify.

It is argued elsewhere in this brief that if Congress gave the Secretary of Labor the power to fix wages, such grant of power would be a delegation of legislative authority which would be invalid for the reason that proper and sufficient standards were not laid down by Congress to guide the Secretary in the exercise of said power. A delegation of legislative power without such standards is invalid.

Opp Cotton Mills v. Administrator, 312 U. S. 126, 85 L. Ed. 624;

Schecter v. United States, 295 U. S. 495, 79 L. Ed. 1570;

Star Kist v. United States, 169 F. Supp. 268.

To interpret the statute as being an invalid grant of legislative power would in effect nullify part of the statute. In the construction of the statute the courts must necessarily start with the assumption that the legislature intended to enact an effective law, and the legislature is not presumed to have done a useless act

in enacting a statute which is invalid. Therefore, the court should, if reasonably possible, interpret any statute so as to give it effect. The court should not interpret a statute so as to nullify it, destroy it, emasculate it, repeal it, or defeat it. Where there is an alternative construction or interpretation which will avoid this result, the court must apply such other interpretation. There is such other interpretation or construction, *i.e.,* the one placed on the statute by the Secretary of Labor when the statute was first enacted, which interpretation was followed for the first twelve years of the administration of the Migrant Labor program. Such interpretation confines the Secretary to a determination of the adverse effect measured against prevailing wage. It avoids rendering the statute null and void and unconstitutional.

N. L. R. B. v. Jones & Laughlin, 301 U. S. 1, 81 L. Ed. 893;

Federal Trade Com. v. American Tobacco, 264 U. S. 298, 68 L. Ed. 696.

F. The Legislative History of the Act Proves That Congress Did Not Intend to Give the Secretary of Labor the Power to Fix Wages.

Basic to the interpretation of any statute is the ascertainment of the legislative intent. *United States v. Rosenbloom,* 315 U. S. 50, 86 L. Ed. 671; 50 Am. Jur. 200. This is best obtained by reference to the proceedings and debates of Congress and the Committee Reports on Public Law 78 and the periodic re-enactment thereof.

One indication of Congressional intent that adverse effect was to be measured by reference to the prevail-

ing wage is *Senate Report 1045* dated July 20, 1955, U. S. Code, *Congressional and Administrative News,* 84th Congress, 1st Session 1955, page 2844 at 2848, on the bill to extend Public Law 78 and amend Section 503. In explaining the reasons for the proposed amendment, which was enacted into law, the Report stated:

> "To assure that such conditions do not prevail, the committee has included an amendment to section 503. The amendment specifies that the Secretary is to obtain information on the availability of domestic workers and the wage rates paid to them from agricultural employers and farmworkers employed in the area where a shortage of domestic workers is reported to exist. . . . After the Secretary has made his determination pursuant to section 503, he shall cause to be posted in appropriate public places the number of workers to be imported, and such other relevant information respecting his certifications as he deems necessary. It is believed that this amendment specifying the information to be obtained and the persons from whom it is to be obtained will clarify procedures presently used and improve operations under the act."

Obviously, if the information to be obtained by the Secretary of Labor was the prevailing wage, then adverse effect was to be determined by the Secretary on the basis of the prevailing wage; otherwise the 1955 amendment would have served no purpose and would have prescribed useless action by the Secretary of Labor.

Also informative on the matter of Congressional intent is *Senate Report 2189* dated August 5, 1958, U. S.

Code, *Congressional and Administrative News,* 85th Congress, 2d Session 1958, page 3971 at 3973:

"The program requires many safeguards for the Mexican farmworkers who come into this country. They are guaranteed by our Government that their employers will comply with the provisions of their work contracts with respect to wages and transportation. Section 10 of their work contract guarantees to them the opportunity for employment for at least three-fourths of the workdays during their contract period. Furthermore, they are to receive the prevailing wage for similar work in the area where they are employed.

"The determination of the prevailing wage to be paid has been the subject of discussion at the public hearings. The committee is of the opinion that the duty of the Secretary of Labor in making such findings is quite simple. He should find the prevailing wage rate or rates actually paid to domestic workers in the area of employment and there is no necessity for alterations or use of formulas in the determination of such rates. If the prevailing rates so found are paid to Mexican farmworkers for the same work in the same area under the same conditions, the committee would consider prevailing wage requirements to have been met."

Obviously, Congress intended only that the Secretary of Labor be authorized to determine the prevailing wage, and from this it would naturally follow that adverse effect was to be determined on the basis of prevailing wage. This is a far cry from the determination and enforcement of a "wage necessary to prevent adverse effect".

Also convincing in regard to Congressional intent is the amendment which was proposed in *H. R. 12176,* as shown in House of Representatives Report 1642 dated May 23, 1960. The Brief Summary of H. R. 12176 is:

> "H.R. 12176 would accomplish two simple purposes as follows:
>
> "1. To extend the authorization of the Mexican farm labor program for an additional 2 years, until June 30, 1963.
>
> "2. To clarify the intent of Congress by providing that neither title V of the Agricultural Act of 1949 nor the Wagner-Peyser Act of 1933 is intended to serve as a vehicle for the regulation of wages, hours, or perquisites of domestic farmworkers."

The proposed amendment was:

> "Nothing in this Act nor in the Act of June 6, 1933 (48 Stat. 117), shall be construed to confer any authority upon the Secretary of Labor to regulate the wages, hours, perquisites, or other conditions of employment of domestic farmworkers."

In dealing with this amendment the Majority Report outlines the history and the policy of the Act of June 6, 1933 (48 Stat. 117), which is the Wagner-Peyser Act. The Report stated the position of the majority of the Committee that the Department of Labor had, through its rule-making authority in administering the Wagner-Peyser Act, undertaken to regulate wages and working conditions of domestic labor contrary to the intent of Congress. The Report concluded:

> "The committee asserts a belief that executive interpretation of general language of an act to au-

thorize doing what Congress did not intend be done is a practice inconsistent with constitutional intent and purpose and involving usurpation of a responsibility of the Congress.

"The committee feels that the issue involved is not the motives behind or reasonableness of the regulations issued by the Secretary of Labor. The basic issue is whether, within the framework of our constitutional form of government, it is for the Congress or for the executive branch to legislate in this important area of the law.

"The committee believes that if such regulatory authority is to be exercised by the Federal Government, this should be done only after proper legislative process and affirmative action by the Congress.

"Whatever anyone may believe the Congress should do in this connection, the inescapable fact is that the Congress has not done so; and until Congress chooses to do so by specific congressional enactment, it is a violation of sound governmental practice for an executive agency to proceed without such specific mandate.

"The bill reported by the committee would establish what, in its opinion, has always been the congressional intent, that the Wagner-Peyser Act is not to be construed to authorize the regulation of wages, hours, or prerequisites provided farmworkers."

Thus we submit that the Report and the proposed mendment clearly indicate the expressed opinion of the \gricultural Committee that it was never the intention

of Congress to confer on the Secretary of Labor the authority to regulate wages or working conditions in agriculture, either under the Wagner-Peyser Act or under Public Law 78.

H. R. 12176 was never reported out of committee and consequently never came to a vote before the House of Representatives, but the failure to report out the bill and bring it to a vote before the House is clearly explained by Congressman Gathings in the following exchange with Congressman Poage (*Congressional Record June 29, 1960,* page 13901):

> "Mr. Gathings. Mr. Chairman, the Subcommittee on Supplies, Machinery, and Manpower held extended hearings on this legislation. We reported out a bill that bore my name, that was really a committee bill. That legislation had two parts. One incorporated the identical language carried in the Sisk bill which would extend Public Law 78 for a period of 2 years. The other provision was one that had to do with the Wagner-Peyser Act, which was passed by this Congress in 1933, and the regulations that had been promulgated under the provisions of that act by the Secretary of Labor.
>
> It was felt in the dying hours of this Congress that we did not have sufficient time to go into the second version of that legislation, so we deferred action on that until the next session when we would have an opportunity to consider that phase of it.
>
> Mr. Poage. Mr. Chairman, will the gentleman yield?

Mr. Gathings. I yield to the gentleman from Texas.

Mr. Poage. Am I not correct in saying that the subcommittee and later the committee felt that it would be unnecessary and unwise to bring in the additional provisions inasmuch as it was clearly the existing law and that the committee felt that the Secretary had no power to exercise the powers that he claimed to have a right to exercise; and since he had no power, we would be but doing a vain thing to try to say to him that he could not have this power that he did not have.

Mr. Gathings. We recognize that he does not have that power to issue these regulations under the Wagner-Peyser Act since the legislative branch gave no such authority to him.

Mr. Poage. That is right. We all recognize he does not have those powers today. I want it understood that right now we are advising the House that this is a part of the legislative history.

Mr. Bailey. Mr. Chairman, will the gentleman yield?

Mr. Gathings. I yield to the gentleman from West Virginia.

Mr. Bailey. Are we to understand that you are going to put the Secretary of Labor, Mr. Mitchell, on record as being for this legislation?

Mr. Gathings. I am not speaking for the Secretary of Labor.

Mr. Bailey. I am saying that he is not for this legislation.

Mr. Gathings. He may not be and he may be, but he has been supporting it previously.

Mr. Bailey. You are taking away from him authority that he already has.

Mr. Gathings. I will not yield any further to the gentleman. He has assured authority that does not exist. Congress is the legislative branch and it has exempted the farmer from the provisions of the Fair Labor Standards Act and the Landrum-Griffin Act.

Mr. McIntire. Mr. Chairman, will the gentleman yield?

Mr. Gathings. I yield to the gentleman from Maine.

Mr. McIntire. Am I correct in my understanding that the subcommittee that considered this legislation had under consideration the matter of the jurisdiction of the Wagner-Peyser Act, and that after very careful consideration it is the opinion of the subcommittee and the full committee that the Wagner-Peyser Act does not grant to the Secretary of Labor the authority to deny the use of Employment Security offices to farmers unless they comply with such conditions as the Secretary of Labor may wish to impose?

Mr. Gathings. It does not and did not grant him such authority. That is the opinion of the subcommittee and the full Committee on Agriculture. There were only three dissenters on the committee which is composed of 33 members.

Mr. McIntire. The fact that the conditions of the Wagner-Peyser Act are not a part of the legislation now before the Committee does not change the position of the subcommittee in relation to our understanding of the provisions of that act?

Mr. Gathings. Not at all."

Thus it is clearly explained why the proposed amendment was never put to a vote but at the same time it shows the intention of Congress with respect to the limits of the authority of the Secretary of Labor over wages, hours, etc.

Further evidence of the intention of Congress is set forth in House of Representatives Report 274, 88th Congress 1st Session dated May 6, 1963 to accompany H. R. 5497 which was a proposed bill to extend Public Law 78 for an additional two years:

"During the hearings the committee has reviewed evidence regarding the administration of the act by the Secretary of Labor. More particularly, it has considered with great concern the determinations made by the Secretary of Labor under subsection (2) of section 503 of the act. Under this subsection, before any workers are to be made available for employment in any area, the Secretary of Labor must first determine and certify that the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed.

Purporting to act under this authority, the Secretary of Labor has recently been setting wage rates for Mexican nationals (which also must be paid to domestic workers by the employers of nationals) which he euphemistically calls "the wage rate to prevent adverse effect." The committee has viewed this action with great concern because, under the guise of making a determination relating to the wages of Mexican workers the Secretary of Labor actually is establishing a minimum wage for domestic agricultural labor. Clearly it

was never the intention of Congress to give the Secretary such authority. Congress only intended that he determine adverse effect on the basis of the prevailing wage. The so-called adverse effect wage orders are presently being challenged in the courts, and it is expected that the courts will in due course curb this unwarranted usurpation of power by the Secretary of Labor.

This same matter was considered with considerable concern by this committee in connection with its report on H.R. 12176, 86th Cong. (H. Rept. 1642, May 23, 1960). In that report the committee declared:

> The basic issue is whether, within the framework of our constitutional form of government, it is for the Congress or for the executive branch to legislate in this important area [the regulation of wages and hours] of the law.
>
> The committee believes that if such regulatory authority is to be exercised by the Federal Government, this should be done only after proper legislative process and affirmative action by the Congress.
>
> Whatever anyone may believe the Congress should do in this connection, the inescapable fact is that the Congress has not done so; and until Congress chooses to do so by specific congressional enactment, it is a violation of sound governmental practice for an executive agency to proceed without such specific mandate.

The committee reiterates its position on this matter, and it hereby declares that this recommendation for an extension of the act is not to be con-

strued in any way as condoning or approving the actions of the Secretary of Labor in assuming authority to regulate wages or hours in agriculture."

Another indication of Congressional intent is set forth n *Senate Report 619* dated July 25, 1961. In propos- ng an amendment to Section 501 the Report sets forth:

"The new section 505 prohibits workers recruited under the act from being made available to, or permitted to remain in the employ of, any employer unless he offers and pays both domestic and foreign workers not less than the prevailing wage paid in the area to domestic workers engaged in similar work. It was not the purpose of the committee to establish minimum wages for farmworkers or to authorize the Secretary of Labor to establish such minimum wages, and the bill does not do so. The establishment of minimum wages falls within the province of the Committee on Labor and Public Welfare, rather than this committee, and employees in agriculture have for good reason been exempted from the minimum wage provisions of the Fair Labor Standards Act."

In conclusion, it is submitted that the legislative history of Public Law 78 and all amendments and proposed amendments thereto establish clearly that Congress intended that the power of the Secretary of Labor should be limited to the determination of the prevailing wage and to the measurement of adverse effect as against the prevailing wage. The legislative history of Public Law 78 indicates clearly that Congress repeatedly expressed its alarm at encroachments made by the Secretary of Labor on the prerogatives of Congress, and repeatedly warned that the Secretary of Labor had no authority to fix wages in agriculture.

III.

IF SECTION 503(2) GIVES THE SECRETARY OF LABOR POWER TO FIX WAGES IT IS INVALID AS DELEGATION OF LEGISLATIVE AUTHORITY WITHOUT SUFFICIENT AND PROPER STANDARDS TO GUIDE THE SECRETARY OF LABOR.

If the court should hold that it was the Congressional intent that Section 503(2) gives the Secretary of Labor the authority to fix or establish a minimum wage, then it is submitted that said law is invalid because it is a delegation of legislative authority, unaccompanied by sufficient standards or expressions of policy to guide and limit the action of the Secretary.

The Constitution provides that all legislative power shall be vested in Congress (U. S. Constitution, Article I, Section 1) and it is axiomatic that Congress may not abdicate its power or delegate its lawmaking functions to an executive or an administrative offer of the government. As expressed by the court in *Schecter v. United States,* 295 U. S. 495, 531, 79 L. Ed. 1570:

> "Congress is not permitted to abdicate or transfer to others the essential legislative functions with which it is thus vested."

There are frequent instances where Congress confers upon the executive or upon an administrative officer the authority to make certain findings of fact, which determine the effective operation of a particular statute, but any such grant of authority must be accompanied

by definite standards to guide the executive or administrative officer in carrying out such functions. As explained by the court in *Schecter v. U. S., supra*:

> "We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the National Legislature cannot deal directly. We pointed out in the Panama Ref. Co. case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

In dealing with the same question the court in the case of *Wichita v. Public Utilities Commission,* 260 U. S. 48, 67 L. Ed. 124 (cited with approval in *Panama Refining Co. v. Ryan,* 293 U. S. 388, 79 L. Ed. 447), held:

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

It is conceded that Congress may, under proper circumstances, grant to an executive or administrative officer the authority to make findings or determinations while acting within definitely prescribed limitations of policy set down by Congress, but in the case before the court Congress has not laid down any such standards.

In the case of *Opp Cotton Mills, Inc. v. Administrator,* 312 U. S. 125, 85 L. Ed. 624, the Supreme Court faced the same problem as in the case before this court. The facts of this case were as follows: The Fair Labor Standards Act in its original form set up an administrative procedure for establishing a minimum wage in particular industries, but not in excess of 40¢ per hour, such a wage to be fixed for any industry by the administrator in collaboration with an industry committee. The Act provided that the administrator should from time to time convene an industry committee for each such industry, which committee should recommend the minimum wage or rates of wage to be paid by employers in each industry or classification therein. Upon the administrator's reference to the committee of the question of minimum wage rates in an industry the statute required the committee to investigate conditions in the industry and to recommend to the administrator the highest minimum wage rates for the industry, having due regard to the economic and competitive conditions which would not substantially curtail employment in the industry. The committee was also required to recommend such reasonable classifications within any industry as it determined to be necessary for the purpose of fixing for each classification within the industry the highest min-

imum wage rate. Other specific instructions for the committee were contained in the statute after the industry committee filed its report with the administrator. Later, after due notice to interested persons and giving them an opportunity to be heard, the administrator was required either to approve or disapprove the recommendations, and finally to establish a minimum wage rate. These provisions of the Act were attacked as unconstitutional delegation of legislative authority on the ground that the standards set down by Congress were vague and indefinite. The court held that the Act was valid and did not constitute an unlawful delegation of power.

An analysis of this case and of the Fair Labor Standards Act as it was originally enacted shows clearly the line of demarcation between a lawful grant of authority to an administrative official and an unlawful delegation of legislative power. It is submitted that applying the principles enunciated by this case to the case at hand shows clearly that if Congress intended to grant to the Secretary of Labor the authority to establish and fix a minimum wage, such a grant of authority was invalid because of the failure to fix standards, set definite policies, and prescribe limits.

On the other hand, applying the same principles, it is clear that if Congress intended nothing more than that the Secretary of Labor should determine by an appropriate survey the prevailing wage in each area where Mexican Nationals were to be employed, and on the basis of this prevailing wage determine whether adverse effect would result, such a grant of authority would clearly come within "prescribed limits and the determination of facts which the policies as declared

by the legislature is to apply." *Schecter v. U. S., supra.*

In conclusion, the appellants state unequivocally that they do not believe that Section 503 is unconstitutional. They do believe, however, that the action of the Secretary of Labor in fixing the so-called adverse effect wage was a legislative act. From this it inevitably follows either that the action of the Secretary is invalid under the law, or the law giving him the authority to legislate is invalid. By pleading in their Second Cause of Action the unconstitutionality of Section 503 they intend to point up the issue that either the action of the Secretary of Labor or the Act of Congress is invalid, and they hope to convince the court that it is not Congress, but the Secretary of Labor who stands in error; that Congress did not enact an invalid statute making an unconstitutional delegation of authority —rather the Secretary of Labor exceeded the authority given him by Congress when he issued the adverse effect wage orders.

CONCLUSION.

For the reasons stated it is respectfully submitted that the District Court's order granting summary judgment to the defendants, and refusing to grant injunctive and declaratory relief as prayed for by the plaintiffs should be reversed.

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Certificate.

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

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